No. 33.

OFFICE SUPREME COURT of U. S.
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Petition for Rehearing.

Rec'd Feb. 4, 1902.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 208. 33

THE NATIONAL FOUNDRY & PIPE WORKS, LIMITED,
Plaintiff in Error,

vs.

OCONTO CITY WATER SUPPLY COMPANY,
Defendant in Error.

PETITION FOR REHEARING.

GEO. H. NOYES,
Counsel for Plaintiff in Error.

EVENING WISCONSIN CO., PRINTERS, MILWAUKEE.

SUPREME COURT OF THE UNITED STATES

October Term, 1900.

No. 216.

THE NATIONAL FOUNDRY & PIPE WORKS, LIMITED,
Plaintiff in Error,

vs.

OCONTO CITY WATER SUPPLY COMPANY,
Defendant in Error.

The plaintiff in error respectfully petitions the Court for a rehearing upon the following grounds:

Prior to the commencement in the state court of the suit at bar, an action was begun by the plaintiff in error in the federal court seeking to pay off and redeem the mortgage given to Andrews and Whitcomb. Such action is now pending in the United States Circuit Court of Appeals.

The action to redeem was brought by the plaintiff in error upon the theory that the right to do so had been recognized in the creditors' suit and that the decree therein was not *res adjudicata* as to this right. The reasons for this conclusion are as follows:

Upon the original argument of the creditors' suit in the Court of Appeals (46 U. S. App., 205), counsel for the mortgagees contended in their brief that "if the

complaining creditors have any equity to relief against any securities of Andrews and Whitcomb or the judgment of foreclosure and sale or the possession under them, there being no fraud, collusion or estoppel, it could be granted only on a bill to redeem. * * * This is not such a suit and should have been dismissed." In the petition for rehearing in that case appellee's counsel contended that it should have the right to redeem from the mortgage under the bill as framed and under the prayer for general relief, or under such amendments to the bill as would authorize the court to grant such relief. The contention was not only that it had a valid judgment at law but that it had a valid adjudication in the mechanic's lien suit, not only of the amount due the complainant but of a valid lien as against the mortgagor and that it ought to be allowed to pay off and redeem the mortgage. The point was thus stated in the petition for rehearing:

> "If it be held that they cannot enforce the mechanic's lien decree adversely to Andrews and Whitcomb, certainly they can use such lien to entitle them to redeem the mortgage."

It was as to this contention of the right to redeem that Judge Woods in his opinion stated:

> "The question whether appellees as judgment creditors of the Oconto Water Company have a right to redeem from the sale made to Andrews and Whitcomb upon their foreclosure decree to which the appellees were not parties, does not in our opinion arise in this record and will not be prejudiced by our decision."

When the mandate was sent down to the Court below the question of the right to redeem was again presented to his Honor, Judge Jenkins, and in the written opinion filed he expressly said that the appellee "should be placed in a position to be able to redeem," and so it was provided in the final decree that the transfer of the title by virtue of the mortgage foreclosure proceedings to the Oconto City Water Supply Company, should be

"without prejudice to any rights which said complainant or said R. D. Wood & Company may have under their said mechanic's lien decrees to redeem from said instruments of mortgage or either of them, or from the sale under the proceedings to foreclose the same."

Relying on this right to seek relief by means of redemption unprejudiced by the proceedings in the creditors' bill suit, the plaintiff in error filed its bill to redeem, setting up its judgment at law and in the mechanic's lien suit against the Oconto Water Company and such other facts and asking such relief as are necessary and proper in a suit of that nature.

In this connection we desire to call attention to the fact that the Supreme Court of the state in the action at bar also recognized the right of the appellant to redeem in the opinion filed, wherein it is said "the appellant's lien having been adjudged void as to respondent, and it being conceded or undisputed that respondent is legally in possession of the mortgaged property with at least the rights of mortgagees so circumstanced, it cannot be ousted from that possession *without payment of the mortgage indebtedness.*" (105 Wis., 65.)

The assignments of error in the case at bar do not raise the question as to whether the plaintiff in error's right to redeem was barred by the decree in the creditors' suit. But counsel for defendant in error in the brief filed raised the contention that "there is no right to redeem under the general prayer for relief." In the brief of plaintiff in error in reply it was said that the question of the right of redemption was not involved in the decision of the case, inasmuch as the defendant in error presented no such issue by its answer in the court below. Some authorities were, however, referred to upon the proposition that had such an issue been presented, the right to redeem would lie in favor of the plaintiff in error because it had a valid lien as against the mortgagor, and had acquired the mortgagor's equity of re-

demption by foreclosure of its prior lien, which equity had not been foreclosed in the mortgage foreclosure suit. A consideration of the authorities cited was unnecessary, inasmuch as the point suggested was not a federal question, nor was the question a federal one as to whether the state court was justified under the pleadings in granting affirmative relief. Upon this latter question the state court simply ruled that the judgment in the case at bar did not grant affirmative relief, but that it amounted in substance only to a judgment of dismissal of the plaintiff's complaint. (105 Wis., 69.)

Our contention is therefore that the question of the right of the plaintiff in error to pay off, and redeem from, the mortgage was not, and was not intended to be, adjudicated in the creditors' suit. Furthermore, that such question was not at issue in the suit at bar and should be left unprejudiced by any opinion upon the same, or that the opinion should expressly state that the right to redeem was not considered nor adjudicated in the creditors' suit.

The doctrine that a judgment in a suit to set aside a mortgage decreeing the mortgage to be valid and the title of the plaintiff to be invalid as against the mortgagee, will not prevent the filing of a subsequent bill by the holder of such invalid title to redeem the mortgage was first announced in *Rand vs. Cartwright*, 1 Ch. Cas., 59, in which the opinion was as follows:

> "A man makes a voluntary deed and then a mortgage of the same lands. The first deed upon trial at law is found fraudulent; he to whom the deed is made exhibits a bill to redeem the mortgage. It is held that the first deed was fraudulent, because voluntary *quoad* the mortgage money and *pro tanto*, yet that it was good as to the equity of redemption, and would pass that, for that a voluntary deed will bind the party that makes it and his heirs."

See 1 *Powell on Mortgages*, 261.

See additional cases cited on pages 8 and 9 on brief of plaintiff in error in reply, on file.

The bill in the creditors' suit was not filed for redemption, nor could a decree be founded on it that the complainant therein should be let in to redeem.

The complainant assailed the validity of the mortgage and the foreclosure sale and asserted a lien paramount thereto. The averments therein were adapted only to the establishment of the mechanic's lien as paramount to the mortgage and to the cancellation of the mortgage because of its alleged invalidity. These averments were not only unnecessary but were repugnant to and inconsistent with averments necessary to a bill to redeem. Had the bill in the creditors' suit raised by its averments the issue as to the right of the complainant to redeem as well as the issue of the validity of the mechanic's lien and the invalidity of the defendant's mortgage, the bill would "have been properly dismissed at the hearing by the Court *sua sponte* for multifariousness."

Merriman vs. Railroad Co. (U. S. Ct. App., 7th Cir.), 24 U. S. App., 428-456.

In the case last cited it is held that a bill containing the allegations of a creditor's bill and also allegations of a bill for redemption, states "two inconsistent causes of action and the right to recover upon one theory is destructive of the right to recover upon the other. Such a bill cannot be maintained. It would be multifarious and self-contradictory." (*Supra*, pp. 455-6.)

The court cited with approval the language of the opinion in *Micou vs. Ashhurst*, 55 Ala., 607-12, where speaking of a creditor's bill it is said that "the bill is not filed for redemption; *nor could a decree be founded on it that the complainant be let in to redeem.* The averments of the bill are adapted only to a decree for the cancellation of the mortgage, because the debt is founded on an illegal consideration. As a general rule

a bill may be framed in a double aspect, or in the alternative, when either of the aspects or alternatives entitles the complainant to the same relief. But we do not understand that, when a bill is filed for a distinct purpose, which wholly fails, whether on the facts stated, or on the proofs, it can be converted into a bill for another purpose." (*Supra*, p. 458.)

It is conceded that there were no averments in the bill in the creditors' suit upon which a decree could have been founded to let the complainant in to redeem, and that the issues in such case made by the pleadings were not such as would entitle the complainant in the creditors' suit to any such relief. How, then, can it be said that the decree in that suit adjudicated that the complainant was not entitled to the right to redeem?

> "Every decree in a suit in equity must be considered in connection with the pleadings, and if its language is broader than is required, it will be limited by construction so that its effect shall be such and such only as is needed for the purposes of the case that has been made and the issues that have been decided."
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> *Graham vs. R. R. Co.*, 3 Wall., 704.
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> *Barnes vs. R. R. Co.*, 122 U. S., 1, p. 14.

> "A judgment to be conclusive upon the parties to the litigation must be responsive to the matters controverted," * * * " to the issues tendered by the pleadings," otherwise it "will be treated as a nullity."
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> *Reynolds vs. Stockton*, 140 U. S., 254-70-1.

Nor should the plaintiff in error be held to be estopped from bringing its suit to redeem, under the doctrine of election. While it is true that where there exists an election between inconsistent remedies, the party is confined to the one which, with knowledge of his rights, he first adopts, yet "if plaintiff was mistaken and undertook to avail himself of a remedy that he was never entitled to, this does not estop him from

subsequently availing himself of a remedy that he is entitled to under the facts of the case."

Agar vs. Winslow, 123 Cal., 587.
Bunch vs. Grave, 111 Ind., 351.
McQueen's Appeal, 104 Pa. St., 595.

The plaintiff in error mistakenly supposed it had a lien which it could enforce adversely to the rights of the mortgagees. The judgment to the contrary should not be held to deprive it of the right to recognize the mortgage as valid and to pay it. The remedy which it has by redemption, if any, should not be prejudiced by the fact that it assumed to rely on the doctrine established in the state and federal court that a mechanic's lien would lie against the property of a quasi-public corporation, and on the fact that such doctrine would not be changed by subsequent decisions of those courts. The doctrine was changed and the remedy of the complainant in the creditors' bill suit found fruitless. The only remedy left is the one invoked by the plaintiff in error in the suit to redeem.

It is respectfully submitted, therefore, that the question of the right of the plaintiff in error to maintain a bill to pay off and redeem the mortgage should be left unprejudiced by the decision of this case, and that the opinion of this court in terms should so declare. This would perhaps require some modification of the following portion of the opinion filed:

> "The claim that because by the thing adjudged it is indisputable that the Pipe Works had a lien against the Water Company, it therefore follows that there is still a right to redeem as against Andrews and Whitcomb and the Water Supply Company, even although it was established by the effect of *res judicata* arising from the creditors' suit, that the lien as to the parties named was inoperative and a nullity, is but another form of asserting that the decree in the creditors' suit was not *res judicata* between the Pipe Works and Andrews and Whitcomb and the Water Supply Company."

If, however, it be held that the question of the right of the plaintiff in error to redeem is one that may properly be determined by this court upon this record instead of being left for determination by the court in which an action for that purpose is now pending, a rehearing is respectfully prayed in order that the arguments on that question may be fully presented.

NATIONAL FOUNDRY AND PIPE WORKS, LTD.,
Plaintiff in Error.

I hereby certify that in my opinion the foregoing petition for rehearing is well founded in point of law.

GEO. H. NOYES,
Counsel for Plaintiff in Error.